(24,360)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 616.

THE THAMES AND MERSEY MARINE INSURANCE COMPANY, LIMITED, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 15, 1914.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the United States District Court, Southern District of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between The Thames and Mersey Marine Insurance Company, Limited, Petitioner, and the United States of America, Defendant wherein is involved the construction and application of the Constitution of the United States a manifest error hath happened, to the great damage of the said petitioner, The Thames and Mersey Marine Insurance Company, Limited, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 20th day of August, in the year of our Lord one thousand nine hundred and fourteen.

ALEX. GILCHRIST, JR.,
Clerk of the District Court of the United States, Southern District of New York.

Allowed by—

VAN VECHTEN VEEDER,
Judge of the District Court of the United States, Southern District of New York.

[Endorsed:] L. 12/239. L. 12–239. United States Dist. Ct., South. Dist., N. Y. The Thames & Mersey Marine Ins. Co., L't'd, v. United States of America. Writ of Error. Haight, Sandford & Smith, Att'ys for Petitioner. Filed U. S. District Court, S. D. of N. Y., Aug. 21, 1914.

2 United States District Court, Southern District of New York.

THE THAMES & MERSEY MARINE INSURANCE COMPANY, LIMITED,
against
UNITED STATES OF AMERICA.

Amended Petition.

To the Judges of the United States District Court for the Southern District of New York:

The Thames & Mersey Marine Insurance Company, Limited, brings this, its petition, against the United States of America, and respectfully shows to this Court as follows:

First. Your petitioner, The Thames & Mersey Marine Insurance Company, Limited, is and was a corporation engaged in the business of underwriting policies of marine insurance in the City of New York, within the District aforesaid, between the first day of July, 1898, and the first day of July, 1901. Its principal office for conducting said business in the United States and its residence was and is in the Borough of Manhattan, City of New York, in said District.

Second. During the said period there was levied by the United States of America and petitioner was assessed an internal revenue tax amounting in all to about Five thousand five hundred dollars ($5,500) on policies of marine insurance, underwritten by it, whereby it insured against marine risks certain products and merchandise which were exported from the United States to foreign countries, which amount it afterwards, at various times during the period mentioned, paid to and it was collected by Charles H. Treat, Collector of Internal Revenue of the United States for the Second District of New York.

3 Third. The said policies were issued in manner and form as follows: Open policies were drawn up and executed by the petitioner and delivered to the insured which contained in substance an agreement that petitioner would insure all cargoes of goods which the shipper, the insured, should ship in the foreign trade during the life of said policies respectively, and that the shipper would insure all such cargoes with the petitioner and would from time to time pay the premiums thereon according to the regular rates for the particular voyage upon which each cargo was to be shipped.

Fourth. From time to time the petitioner caused to be delivered to the insured declarations in printed form, a specimen of which in the usual form is annexed hereto and marked Exhibit A. When the shipper had a cargo of goods ready for export and designated and set apart from all other goods for shipment on a particular ship, he filled up the blanks in this declaration in accordance with the facts of each case and delivered the same to petitioner at or about the time of the sailing of the vessel with the cargo on board. In many cases the declaration was not delivered to petitioner until after the vessel had sailed. Upon receiving each of said declarations

petitioner entered thereon the amount and rate of the premium on the particular cargo mentioned therein.

Fifth. The petitioner issued and delivered to the shipper a certificate executed by it that the goods mentioned in each declaration were insured for the voyage and upon the vessel mentioned therein. Said certificate expressed that it was not to be effective until countersigned by the shipper. A specimen of such certificate in the usual form is annexed and marked Exhibit B. Your petitioner is informed and believes that bills of exchange were drawn by the exporters against the respective consignees of said products and merchandise for the price thereof and that the bills of lading for said products and merchandise, so exported as aforesaid, and the
4 said certificates of insurance were required, by custom and usage, as documents necessary to enable the said export to be made and the said bills of exchange to be discounted and were actually forwarded to the foreign country to which each such export was made.

Sixth. At the end of each month during the period aforesaid, petitioner rendered to the insured a bill for the premiums of insurance which had accrued during said month in accordance with the said declarations, which bill was paid by the insured. And at the end of each month petitioner presented to said Collector a book containing a summary of the premiums earned by it during said month, in respect of such insurance. Your petitioner then purchased from said Collector documentary stamps of the amount required by said Act to be used and cancelled in respect of such insurance. These were by direction of said Collector severally affixed by petitioner to the book kept for that purpose in reference to the tax upon said policies and were then duly cancelled by petitioner. The Commissioner of Internal Revenue was authorized by said Act to prescribe such method for the cancellation of said stamps as a substitute for the method provided in the Act as he might deem expedient. He did for the mutual convenience of the office of Internal Revenue and of petitioner, prescribe said method actually adopted by petitioner as aforesaid.

Seventh. The said documentary stamps were required by the said Collector to be affixed and cancelled as aforesaid. Each of said policies, declarations and certificates, by its terms, provided for the insurance of the said products and merchandise so exported as aforesaid during its transit by sea from the United States to foreign ports. Said products and merchandise actually were exported from ports in the United States to foreign ports.

5 Eighth. Said requirement of the said Collector was made in pursuance of Section 29 of the War Revenue Act of Congress of the United States, which was approved June 13, 1898, by which said Act it was enacted that on every policy of marine insurance there should be levied, collected and paid upon the amount of premium charged, one-half of one per cent upon each dollar or fractional part thereof. Said Act further enacted that an adhesive stamp, denoting said tax, should be affixed to each policy and cancelled or that the method prescribed as a substitute therefor, as afore-

said, should be followed. The amount levied and paid as aforesaid was computed upon the said basis of the premiums charged upon said policies.

Ninth. The said requirements of the said War Revenue Act were in violation of the ninth section of the First Article of the Constitution of the United States, which provides: "No tax or duty shall be laid on articles exported from any state." The said revenue stamps so affixed were a tax upon the export of the goods exported in the said vessels. The failure to comply with said Act in reference to the payment of said tax upon the said policies of marine insurance was declared by said Act to be a misdemeanor and the parties to said policies of insurance were liable to punishment by fine for failure to affix said stamps or otherwise comply with the direction of the Commissioner of Internal Revenue in that regard. Said policies not being stamped according to law were declared by said Act to be invalid and of no effect.

Tenth. On the 27th day of July, 1912, an Act was passed by the Congress of the United States and approved by the President, which enacted as follows:

6 "An Act Extending the time for the repayment of certain war-revenue taxes erroneously collected."

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That all claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected under the provisions of section twenty-nine of the Act of Congress approved June thirteenth, eighteen hundred and ninety-eight, known as the war-revenue tax, or of any sums alleged to have been excessive, or in any manner wrongfully collected under the provisions of said Act may be presented to the Commissioner of Internal Revenue on or before the first day of January, nineteen hundred and fourteen, and not thereafter.

SEC. 2. That the Secretary of the Treasury is hereby authorized and directed to pay, out of the moneys of the United States not otherwise appropriated, to such claimants as have presented or shall hereafter so present their claims, and shall establish such erroneous or illegal assessment and collection, any sums paid by them or on their account or in their interest to the United States under the provisions of the Act aforesaid."

Eleventh. In accordance with the provisions of the said last mentioned Act, your petitioner did present its claim for the refunding of said tax so as aforesaid illegally assessed and collected, to the Commissioner of Internal Revenue on or about the 22nd day of December, 1913, and the said Commissioner of Internal Revenue thereupon directed that said claim should be filed with the collector to whom the taxes were paid; and your petitioner was instructed that he would enter the same on his record and cause examination to be made and certify the same to the office of the Commissioner of Internal Revenue for consideration. Your petitioner is informed and believes that he did, in accordance with the rules of the Commissioner of Internal Revenue and his direction, transmit the same

to said Commissioner. The Commissioner of Internal Revenue, as your petitioner is informed and believes, refused to approve the said claim, or to present the same to the Secretary of the Treasury for payment, on the ground that the provisions of the last mentioned Act applied solely to taxes collected upon legacies under Section 29 of the Act of June 13, 1898. And further for the reason that
7 the said Commissioner claimed that the taxes imposed on policies of marine insurance were not illegally collected.

Wherefore your petitioner demands judgment against the United States of America for Five thousand five hundred dollars ($5,500) and that the Secretary of the Treasury thereof be directed, by the judgment of this Court, to pay out of any moneys of the United States not otherwise appropriated, to the petitioner, the said sum paid by it or its account to the United States under the provisions of Section 29 of the Act of Congress approved June 13, 1898, known as the War Revenue Act as aforesaid, and that your petitioner may have such other relief as may be just, together with the costs of this Court.

HAIGHT, SANDFORD & SMITH,
Attorneys for Petitioner.

EVERETT P. WHEELER,
Of Counsel.

8 SOUTHERN DISTRICT OF NEW YORK,
County of New York, ss:

H. K. Fowler, being duly sworn, deposes and says: I am agent for the petitioner herein. I have read the foregoing amended petition and know the contents thereof, and the same is true of my own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

H. K. FOWLER.

Sworn to before me, this 26th day of June, 1914.
[SEAL.] HARRY M. HEWITT,
Notary Public, N. Y. Co.

9 EXHIBIT A.

The Thames & Mersey Marine Insurance Company, Limited.

United States Branch, 82-92 Beaver Street, New York.

Date ——, —.

Enter on open policy of —— ——, No. —, $— at — per cent — On — Conditions — Per — Sailing— At and from—— To —— Bill of Lading dated —.

—— ——, *Applicant.*
—— ——, *Approved.*

Warranted by the assured that the loading of vessels with Grain, Petroleum and heavy cargoes shall be made in accordance with the rules of the National Board of Marine Underwriters on such cargoes, and that a certificate of an inspector appointed by the Board of Underwriters shall be obtained before the sailing of such vessels.

Risks covered by vessels carrying in excess of their net register tonnage of Grain in bulk, or in bulk and/or bags, held covered at an extra premium to be arranged.

Memo. for the Company.

$— @ — per cent.

Cards .....
Dealers' Book .....
H/O. .....
Cert. No. .....
Payable at .....

[On right margin:] To be approved if in accordance with the terms of the policy.

10 EXHIBIT B.

Certificate of Insurance.

$—. No. 403, A. H. Co.

The Thames & Mersey Marine Insurance Company, Limited.

Liverpool and London Chambers, Liverpool.

H. K. Fowler, Agent and Attorney, 82-92 Beaver Street, New York

NEW YORK, ——, —.

This is to Certify, that on the — this Company insured under Policy No. 1249, for The American Hay Company, — Dollars, on — valued at — shipped on board of the — at and from —— and it is hereby understood and agreed that in case of loss such loss is payable to the order of The American Hay Company, at — on surrender of this Certificate.

This Certificate represents and takes the place of the Policy, and conveys all the rights of the Original Policy Holder (for the purpose of collecting any loss or claim) as fully as if the property was covered by a special Policy direct to the holder of the Certificate, and free from any liability for unpaid premiums. This Certificate is not valid unless countersigned by The American Hay Company.

H. K. FOWLER, *Agent.*

Marks and Numbers.

Clauses.

Warranted free from Particular Average, unless the vessel or craft be stranded, sunk, burnt or in collision.

Warranted by the assured free from loss or expense arising from capture, seizure, restraint, detention or destruction, or the consequences of any attempt thereat, whether lawful or unlawful; and whether by the act of any belligerent nations or by governments of seceding or revolting States, or by unauthorized or lawless persons, therein, or otherwise; and whether occurring in a port of distress or otherwise; anything in this Policy to the contrary notwithstanding. Also, warranted not to abandon in case of blockade, and free from any expense in consequence thereof; but in the event of blockade to be at liberty to proceed to an open port and there end the voyage.

Held covered in case of deviation or change of voyage, provided notice be given and any additional premium required be agreed immediately after receipt of advices.

Including risk of craft to and from the vessel; each lighter or craft to be considered as if separately insured.

It is Hereby Agreed that any loss or claim under this Certificate shall be paid in Sterling, at the Office of the Company, in Liverpool, at the rate of Four Dollars and Ninety-Five Cents ($4.95/100) Gold, to the Pound Sterling.

On goods destined for ports and places on the Continent of Europe, any loss or claim hereunder may, however, if so agreed at the time of issue of this Certificate, be payable by one of the Company's settling Agents named at back hereof, and at the rate of exchange set opposite his name.

It is Hereby Understood and Agreed that in case of loss or damage happening to the property insured under this Certificate, the same shall be reported as soon as the goods are landed, or the loss is known or expected, to the Company at their Office, Liverpool and London Chambers, Liverpool, England, or if the port of destination be, or the damaged goods arrive at, ports on the Continent of Europe, it is agreed that any loss or damage shall be promptly reported for attention to the nearest located Agent of the Company. (See list of all such Agents printed on the back of this Certificate.)

Shipments to London.—In case of loss or damage the holders of this certificate are also requested to communicate immediately with Messrs. E. L. Johnson's Sons & Mowat, Lloyd's, London, E. C.

Claims to be adjusted according to the usages of Lloyds but subject to the conditions of the Policy and Contract of Insurance.

NOTICE.—To conform with the Revenue Laws of Great Britain, in order to collect a claim under this Certificate it must be stamped within ten days after its receipt in the United Kingdom.

[Stamped across face:] Specimen. Specimen. Specimen. Specimen.

11 *Agents and Bankers of the Thames & Mersey Marine Insurance Co., Limited, on the Continent of Europe.*

Agents.	Bankers.	Rates of Exchange.
Amsterdam, J. H. Schröder	Banque de Paris, et des Pays bas	5.06¼ Francs per Dollar.
Antwerp, Leon Van Peborgh	Compagnie Commerciale Belge.	do.
Bremen, Carl Graef		Ninety-eight (98) cents per four (4) Marks.
Bordeaux, James Moss & Co.	James Moss & Co.	5.06¼ Francs per Dollar.
Dunkirk, Albert Mine		
Genoa, Evan MacKenzie	Evan MacKenzie.	do.
Hamburg, Bleichröder & Co.	Bleichröder & Co.	Ninety-eight (98) cents per four (4) Marks.
Havre, Frederick Wood	Neuflize & Cie., Paris.	5.06¼ Francs per Dollar.
Marseilles, Gaubert & Spies	Rubaud Frères,	do.
Paris, L. Degoix	Neuflize & Cie.,	do.
Rotterdam, John Hudig & Son	Bank of Rotterdam,	Forty-two (42) cents per Florin.
Trieste, Edgar H. Greenham	Neuflize & Cie., Paris.	5.06¼ Francs per Dollar.

12 (Endorsed:) A copy of the within paper has been this day received at this office, June 30, 1914. H. Snowden Marshall, U. S. Attorney.—U. S. District Court, S. D. of N. Y. Filed Jun- 30, 1914.

13 *Demurrer.*

United States District Court, Southern District of New York.

THE THAMES & MERSEY MARINE INSURANCE COMPANY, LTD.,
vs.
UNITED STATES OF AMERICA.

The United States of America, defendant above named, by H. Snowden Marshall, United States Attorney for the Southern District of New York, its attorney, appearing herein specially and not submitting itself to the jurisdiction of this court, demurs to the amended petition herein on the ground that it appears on the face thereof that the Court has no jurisdiction of this defendant, and also on the further ground that it appears upon the face thereof that the Court has no jurisdiction of the subject of the action, and also on the further ground that the petition does not state facts sufficient to constitute a cause of action.

Dated: New York, July 2, 1914.

H. SNOWDEN MARSHALL,
United States Attorney for the Southern District of New York, Attorney for Defendant.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law and is not interposed for the purpose of delay.

H. SNOWDEN MARSHALL,
United States Attorney.

(Endorsed:) A copy received. Jul- 2, 1914. Haight, Sandford & Smith.—U. S. District Court, S. D. of N. Y. Filed Jul- 2, 1914.

14 *Opinion.*

United States District Court, Southern District of New York.

THE THAMES & MERSEY MARINE INSURANCE COMPANY, LTD.,
against
UNITED STATES OF AMERICA.

HAND, *D. J.:*

The petitioner has now amended so as to show the following facts: A general marine policy is issued covering successive shipments. When a cargo is aboard the assured goes to the underwriter with a "declaration," so-called, which shows the cargo and its value

which is to be covered on the intended voyage. Upon delivery of this the underwriter issues a certificate to cover and the assured sends this along with the bill of lading, draft, etc. to the foreign country.

The contention as I understand it is that insurance upon goods actually in transit is different from insurance upon goods intended for transit, because a tax upon the first class of goods is within the prohibition while a tax upon the second is not. I intended no such distinction, and did not before presuppose that the goods insured had not started upon their transit. Indeed, that question was not raised, as I recall, in the first case. Whether it was or not, the point of the decision in my judgment is, not that the contract of insurance does not touch exports, but that it is not a part of their exportation. That is to say, its performance does not involve any part of the transit, nor does it, like a manifest, record the transit.

It may be that if the goods insured are not yet exports there
15 is a double reason, but the second reason was not what I had in mind.

I said in the other opinion that none of the insurance cases concerned only insurance on goods in transit. In this I was wrong. Hooper v. California, 155 U. S. 648, dealt with a tax upon the business of marine insurance in San Francisco. Some of the marine insurance written in that city is, I suppose, upon coastwise trade to Eureka on the north and Santa Cruz and San Diego on the south, but the immense mass of it must be either to foreign ports or to Oregon and Washington. In any event no such distinction was taken, but the case went squarely upon the theory that taking insurance upon foreign or interstate trade was not itself foreign or interstate business. The prohibition against taxing exports has been treated as analogous to the prohibition on the states against regulating interstate trade. It is not perhaps necessary to say whether the cases are precisely the same; it is enough that the reasoning in Hooper v. California, supra, presupposes, without expressly deciding, that it is the same, and that if the business was interstate the tax was void; certainly at that time that was the accepted doctrine. I need not consider whether there is to-day a zone in which the state may act till Congress intervene, and whether a state might not tax a business which Congress could regulate. Hooper v. California, supra, seems to me directly to support the defendant. July 16, 1914.

L. H., *D. J.*

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Jul- 16, 1914.

16 *Order Dismissing Complaint.*

At a Stated Term of the District Court of the United States of America within and for the Southern District of New York, Held at the United States Courts and Post-Office Building, Borough of Manhattan, City of New York, on the 3rd Day of August, in the Year Nineteen Hundred and Fourteen.

Present: Hon. William I. Grubb, District Judge.

L. 12/239.

THAMES & MERSEY MARINE INSURANCE CO., LTD.,
against
UNITED STATES OF AMERICA.

A demurrer having been filed by the United States of America to the amended petition herein, and the same having been duly brought on for argument before me, and after hearing Kenneth M. Spence, Esq., Assistant United States Attorney for the Southern District of New York, of Counsel for the defendant herein, in support of the demurrer, and Everett P. Wheeler, Esq., of Counsel for the petitioner, in opposition thereto.

Now, on motion of H. Snowden Marshall, United States Attorney for the Southern District of New York, attorney for the United States of America, it is

Ordered that the said demurrer be, and the same hereby is, sustained, with leave to the petitioner to file an amended petition within ten days from the date hereof, and it is

Further ordered that if the petitioner fails to file an amended petition herein within ten days from the date herein, then judgment shall be entered for the defendant, dismissing the petition with costs.

Dated: Aug. 3, 1914.

W. I. GRUBB, *U. S. D. J.*

U. S. District Court, S. D. of N. Y. Consented to as to form. Haight, Sandford & Smith, Attorneys for Petitioners. Filed Aug. 4, 1914.

17 *Judgment.*

United States District Court, Southern District of New York.

L. 12/239.

THE THAMES & MERSEY MARINE INSURANCE COMPANY, LIMITED,
Petitioner,
vs.
THE UNITED STATES OF AMERICA.

The demurrer of the United States of America, to the amended petition herein, having come on for argument, and an order having

been duly filed on August 3, 1914, wherein it was ordered that the demurrer be and the same hereby is sustained, with leave to the petitioner to file an amended petition within ten days thereof, and further ordering that if the petitioner fails to file an amended petition herein within ten days, then judgment shall be entered for the defendant dismissing the petition with costs, and the petitioner having failed to serve or file an amended petition, and the costs having been taxed at the sum of Seventeen & 70/100 ($17.70) Dollars, it is

Ordered that the amended petition be dismissed, and that the United States have judgment against the petitioner, The Thames & Mersey Marine Insurance Company, Limited, for the sum of Seventeen & 70/100 Dollars, costs, as taxed, and that execution issue therefor.

Judgment signed this 18 day of August, 1914.

ALEX. GILCHRIST, JR., *Clerk.*

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Aug. 18, 1914. 4 P. M.

18 United States District Court, Southern District of New York.

THE THAMES & MERSEY MARINE INSURANCE COMPANY, LIMITED,
against
UNITED STATES OF AMERICA.

Petition for Writ of Error.

Now come Haight, Sandford & Smith, attorneys for the petitioner herein, and say that on the 13th day of August, 1914, this Court entered judgment herein in favor of the defendant and against the petitioner, in which judgment and proceedings had prior thereunto in this cause certain errors were committed to the prejudice of the petitioner, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this petitioner prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States.

Dated, New York, August 13, 1914.

HAIGHT, SANDFORD & SMITH,
Attorneys for Petitioner.

EVERETT P. WHEELER,
Of Counsel.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Aug. 20, 1914.

19 United States District Court, Southern District of New York.

THAMES & MERSEY MARINE INSURANCE CO., LTD.,
against
UNITED STATES OF AMERICA.

Assignment of Errors.

Now comes the Thames & Mersey Marine Insurance Co., Ltd., complaining herein by Haight, Sandford & Smith, its attorneys, and assigns errors in the decision of the said District Court as follows:

First. Said Court erred in holding that the War Revenue Act of June 13, 1898, in so far as it imposed a tax on policies of marine insurance and the declarations and certificates accompanying the same, covering cargoes exported from ports in the United States to foreign ports, and used in business as documents necessary to enable the said export to be made, did not impose a tax upon the said cargoes and upon their export in violation of the Ninth Section of the First Article of the Constitution of the United States, which provides—

"No tax or duty shall be laid on cargoes exported from any State."

Second. Said Court erred in holding that the petition of the said petitioner did not state facts sufficient to constitute a cause of action.

Third. Said Court erred in entering judgment against the petitioner, and in not entering judgment overruling the de-
20 murrer of the defendant, and requiring it to answer the petition.

Wherefore the petitioner prays that for the errors aforesaid judgment may be reversed.

HAIGHT, SANDFORD & SMITH,
Attorneys for Petitioner.

EVERETT P. WHEELER,
Of Counsel.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Aug. 20, 1914.

21 *Stipulation.*

United States District Court, Southern District of New York.

THAMES & MERSEY MARINE INSURANCE COMPANY, LTD.,
against
THE UNITED STATES.

It is hereby stipulated that the record of the above case shall consist of the amended petition, the demurrer to the same, the opinion, order sustaining the demurrer, the judgment, assignment

of error, petition for writ of error, writ of error, citation and this stipulation.

Dated, New York, August 22nd, 1914.

HAIGHT, SANDFORD & SMITH,
Attorneys for Petitioner.

H. SNOWDEN MARSHALL,
U. S. Attorney,
Attorney for The United States.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Aug. 22, 1914.

22 UNITED STATES OF AMERICA, *ss:*

To The United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the United States District Court for the Southern District of New York wherein The Thames and Mersey Marine Insurance Company, Limited, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Van Vechten Veeder, Judge of the District Court of the United States, Southern District of New York, this 20th day of August, in the year of our Lord one thousand nine hundred and fourteen.

VAN VECHTEN VEEDER,
Judge of the District Court of the United States,
Southern District of New York.

23 [Endorsed:] L. 12/239. L. 12–239. U. S. Dist. Ct., South. Dist., N. Y. The Thames & Mersey Marine Ins Co., Ltd., v. United States of America. Citation. Haight, Sandford & Smith, Att'ys for Petitioner. A copy of the within paper has been this day received at this office. Aug. 20, 1914. H. Snowden Marshall, U. S. Attorney. Et gen. U. S. District Court, S. D. of N. Y. Filed Aug. 20, 1914.

24 UNITED STATES OF AMERICA,
Southern District of New York, ss:

THE THAMES AND MERSEY MARINE INSURANCE COMPANY, LIMITED,
Pl'ff in Error,
vs.
UNITED STATES OF AMERICA, Def't in Error.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York,

do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In Testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 1st day of September, in the year of our Lord one thousand nine hundred and Fourteen and of the Independence of the said United States the one hundred and thirty-Ninth.

[Seal District Court of the United States, Southern District of N. Y.]

ALEX. GILCHRIST, JR., *Clerk.*

Clerk's fee for certifying record $5.75.

ALEX. GILCHRIST, JR., *Clerk.*

[Endorsed:] United States Supreme Court. The Thames & Mersey Marine Insurance Co., Ltd., Pl'ff in Error, agst. United States of America, Def't in Error. Transcript of Record. Error to the District Court of the United States for the Southern District of New York.

Endorsed on cover: File No. 24,360. S. New York D. C. U. S. Term No. 616. The Thames and Mersey Marine Insurance Company, Limited, plaintiff in error, vs. The United States. Filed September 4, 1914. File No. 24,360.

[redacted]

INDEX.

Cases Cited.

Supreme Court of the United States,

OCTOBER TERM, 1914.

THAMES & MERSEY MARINE INSURANCE COMPANY, LIMITED, *against* THE UNITED STATES OF AMERICA.	No. 616.

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

This is a writ of error brought to review a judgment of the District Court for the Southern District of New York, dismissing the plaintiffs' petition (pp. 12, 13). The opinion is by Judge Learned Hand (pp. 9, 10).

The action was brought under the Tucker Act, re-enacted in the Judicial Code, to recover the amounts paid by the plaintiff to the Collector of Internal Revenue for an internal revenue tax on divers policies of marine insurance, underwritten by plaintiff upon merchandise exported from the United States to foreign countries.

Defendant demurred to the petition. The demurrer was sustained and judgment entered thereon for defendant.

The tax was assessed under the sixth section of the War Revenue Act, 30 Statutes at Large, p. 451.

"On and after July 1, 1898, there shall be levied, collected and paid for and in respect of . . . the several documents, instruments, matters and things mentioned and described in Schedule A . . . the several taxes or sums of money set down in figures against the same respectively . . . in the said schedule."

Schedule A provides as follows (30 Stats. L. at 461):

"Insurance (marine, inland, fire): Each policy of insurance or other instrument, by whatever name the same shall be called, by which insurance shall be made or renewed upon property of any description (including rents or profits), whether against peril by sea or on inland waters, or by fire or lightning, or other peril, made by any person, association, or corporation, upon the amount of premium charged, one-half of one cent on each dollar, or fractional part thereof; provided that purely co-operative or mutual fire insurance companies carried on by the members thereof solely for the protection of their own property and not for profit shall be exempted from the tax herein provided."

Section 13 of the Act (30 Statutes at Large, p. 454), is as follows:

"Sec. 13. That any person or persons who shall register, issue, sell, or transfer, or who shall cause to be issued, registered, sold, or transferred, any instrument, document, or paper of any kind or description whatsoever mentioned in Schedule A of this Act, without the same being duly stamped, or having thereupon an adhesive stamp for denoting the tax chargeable thereon, and canceled in the manner required by law, with intent to evade the provisions of this Act, shall be deemed

guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding fifty dollars, or by imprisonment not exceeding six months, or both, in the discretion of the court, and such instrument, document, or paper, not being stamped according to law, shall be deemed invalid and of no effect."

The ground of the claim is the unconstitutionality of the tax as a tax on exports, so far as it applies to policies of insurance upon exported goods.

The suit is authorized by the act of Congress approved July 27, 1912, which is pleaded at length in Article Six of the petition (p. 4). The argument on the merits against the claim is that an insurance policy covering goods in transit under an export bill of lading is not a part of the foreign export trade. This brief will be addressed simply to this question, which, in the light of the decisions, may be stated as follows:

Is such an insurance policy an article exported, or a document which, under the usual and recognized methods of business, is essential to carrying on export trade? Was the tax in question a burden on the export trade?

The method of issuing policies of marine insurance is stated in detail in the petition (pp. 2-3, Articles 3-6).

3. Open policies were drawn up and executed by the petitioner and delivered to the insured which contained in substance an agreement that petitioner would insure all cargoes of goods which the shipper, the insured, should ship in the foreign trade during the life of said policies respectively, and that the shipper would insure all such cargoes with the petitioner and would from

time to time pay the premiums thereon according to the regular rates for the particular voyage upon which each cargo was to be shipped.

4. From time to time the petitioner caused to be delivered to the insured declarations in printed form, a specimen of which in the usual form is annexed to the petition and marked Exhibit A, (p. 5). When the shipper had a cargo of goods ready for export and designated and set apart from all other goods for shipment on a particular ship, he filled up the blanks in this declaration in accordance with the facts of each case and delivered the same to petitioner at or about the time of the sailing of the vessel with the cargo on board. In many cases the declaration was not delivered to petitioner until after the vessel had sailed. Upon receiving each of said declarations petitioner entered thereon the amount and rate of the premium on the particular cargo mentioned therein.

5. The petitioner issued and delivered to the shipper a certificate executed by it that the goods mentioned in each declaration were insured for the voyage and upon the vessel mentioned therein. Said certificate expressed that it was not to be effective until countersigned by the shipper. A specimen of such certificate in the usual form is annexed to the petition and marked Exhibit B (p. 6). Bills of exchange were drawn by the exporters against the respective consignees of said merchandise for the price thereof and the bills of lading for said products and merchandise, so exported, and the said certificates of insurance were required, by custom and usage, as documents necessary to enable the said export to be made and the said bills of exchange to be dis-

counted, and were actually forwarded to the foreign country to which each such export was made.

6. At the end of each month during the period covered by the open policy, petitioner rendered to the insured a bill for the premiums of insurance which had accrued during said month in accordance with the said declarations, which bill was paid by the insured. And at the end of each month petitioner presented to the Collector of Internal Revenue, a book containing a summary of the premiums earned by it during said month, in respect of such insurance. Petitioner then purchased from said Collector documentary stamps of the amount required by said Act to be used and cancelled in respect of such insurance. These, by direction of the Collector were severally affixed by petitioner to the book kept for that purpose in reference to the tax upon said policies and were then duly cancelled by petitioner.

This method was prescribed by the Commissioner, according to law, as a substitute for that specified in the section before quoted (R. p. 3).

Specifications of Error.

The three errors assigned (R. 13) all come down to one point:

The Court erred in holding that the clause of the War Revenue Act of 1898 which imposed a tax on policies or certificates of marine insurance covering cargoes exported from the United States to foreign ports did not impose a tax upon exports and was not a violation of the Ninth Section of the First Article of the Constitution of the United States.

POINTS.

FIRST.

These policies are articles exported.

The provision of the United States Constitution which controls the case is as follows:

Article I, Section 9, Clause 5.

"NO TAX OR DUTY SHALL BE LAID ON ARTICLES EXPORTED FROM ANY STATE."

The certificates of insurance were required by the custom and usage of business in the export trade (as alleged in the fifth article of petition, p. 3), to accompany, and they did accompany, and formed a part of the business of exporting merchandise. Bills of exchange were drawn by the exporter against the consignee for the price of the goods exported, and the certificates of insurance in question "were required by custom and usage as documents necessary to enable the said export to be made and the said bills of exchange to be discounted and were actually forwarded to the foreign country to which each such export was made" (p. 3).

The policies then were themselves articles exported. They were forwarded to the consignee, and when he paid the drafts became his. They were therefore just as much an export as the goods themselves.

Defendant's answer is that the tax was imposed before the policies became commercial documents. But this overlooks Section 13 of the War Revenue Act already quoted. That imposes a penalty, not for omitting to stamp the policies when the contract of insurance is made, but when the policy is issued, sold or transferred. Then it becomes a commercial document, if issued for the purposes alleged, and then, and not till then, it is taxable under the Statute. The tax was imposed and paid after the goods exported were at sea.

The authorities dispose of this contention adversely to the defendant, as will be shown under the Second Point.

SECOND.

The constitutional prohibition applies when the document taxed is intended to and becomes a part of the business of exporting.

The courts have established the rule that this provision forbids a tax on exports by indirection. If the tax in question throws a burden on the business of exportation as it is carried on under existing and usual forms of business, it is within the prohibition, and none the less so because the tax in form is on the paper on which the document is printed and applies to policies on goods for inland as well as for foreign trade.

These principles are clearly stated in

Fairbank *v.* United States, 181 U. S. 283.

The tax in that case, under this same War Revenue Act was in form laid on "the vellum, parchment or paper" upon which certain instruments should be written, including, among others, bills of lading for any goods to be exported from a port or place in the United States to any foreign port or place. It is evident that goods could be exported without a bill of lading. But, commercially speaking, a bill of lading is necessary, and the court held the tax unconstitutional, on the ground that such a tax was a burden on exportation by reason of the commercial necessity for using a bill of lading, and that it was not made valid by reason of the fact that it applied to all bills of lading.

The following extracts from the opinion illustrate the reasoning of the court:

"The contention on the part of the government is that no tax or duty is placed upon the article exported; that, so far as the question is in respect to what may be exported and how it should be exported, the statute, following the Constitution, imposes no restriction; that the full scope of the legislation is to impose a stamp duty on a document not necessarily, though ordinarily, used in connection with the exportation of goods." (p. 289.)

"It is a restriction on the power of Congress; and as, in accordance with the rules heretofore noticed, the grants of powers should be so construed as to give full efficacy to those powers and enable Congress to use such means as it deems necessary to carry them into effect, so in like manner a restriction should be enforced in accordance with its letter and spirit, and no legislation can be tolerated which, although it may not conflict with the letter, destroys the spirit and purpose of the restriction imposed." (p. 290).

"By a graduated system, although the tax is called a tax on 'the vellum, parchment, or paper' upon which transactions are written, or by which they are evidenced, a burden may be cast upon exports sufficient to check or retard them, and which will directly conflict with the constitutional provision that no tax or duty shall be laid thereon. The question of power is not to be determined by the amount of the burden attempted to be cast. The Constitutional language is, 'no tax or duty.' (p. 291).

"In other words, the purpose of the restriction is that exportation—all exportation—shall be free from national burden. * * * So it is clear that the framers of the Constitution intended, not merely that exports should not be made a source of revenue to the national government, but that the national government should put nothing in the way of burden upon such exports. If all exports must be free from national tax or duty, such freedom requires, not simply an omission of a tax

upon the articles exported, but also a freedom from any tax which directly burdens the exportation; and, as we have shown, a stamp tax on a bill of lading, which evidences the export, is just as clearly a burden on the exportation as a direct tax on the article mentioned in the bill of lading as the subject of the export." (pp. 292, 293).

"In like manner, the freedom of exportation being guaranteed by the Constitution it cannot be disturbed by any form of legislation which burdens that exportation. The form in which the burden is imposed cannot vary the substance." (p. 295).

"Without enlarging further on these matters, we are of opinion that a stamp tax on a foreign bill of lading is in substance and effect equivalent to a tax on the articles included in that bill of lading, and therefore a tax or duty on exports, and in conflict with the constitutional prohibition." (p. 312).

Almy *v.* California, 24 How. 169.

The question was as to whether a stamp tax imposed by a state on bills of lading for interstate shipments amounted to a regulation of interstate commerce beyond the power of the state to make. It was contended that such a tax was not a tax upon the goods themselves. This Court, however, said:

"But a tax or duty on a bill of lading, although differing in form from a duty on the article shipped, is in substance the same thing; for a bill of lading, or some written instrument of the same import, is necessarily always associated with every shipment of articles of commerce from the ports of one country to those of another. The necessities of commerce require it. And it is hardly less necessary to the existence of such com-

merce than casks to cover tobacco, or bagging to cover cotton, when such articles are exported to a foreign country; for no one would put his property in the hands of a ship master without taking written evidence of its receipt on board the vessel, and the purposes for which it was placed in his hands. The merchant could not send an agent with every vessel, to inform the consignee of the cargo what articles he had shipped, and prove the contract of the master if he failed to deliver them in safety. A bill of lading, therefore, or some equivalent instrument of writing, is invariably associated with every cargo of merchandise exported to a foreign country, and consequently a duty upon that is, in substance and effect, a duty on the article exported."

These extracts show that to constitute a tax upon exports it is not necessary that the tax should be directly laid upon the article exported, nor that it be laid upon an instrumentality which is absolutely indispensable to the carrying on of the business. The question is a practical one as to what the reguiar channels and methods of such a business are. If such usual methods are taxed, that constitute a tax on such business, and the real test is that already quoted from the Fairbank case, as to whether the tax in question directly burdens exportation.

In New York & Cuba Mail SS. Co. *v.* United States, 125 Fed. 320, the question arose as to a tax on manifests of cargoes exported from the United States. The District Court held, following the Fairbank case, that the tax was unconstitutional, and its ruling was not questioned on appeal. The court said:

"If, therefore, a stamp tax on a bill of lading is a tax upon the property exported, a stamp tax on manifests seems to me to be still more clearly such a tax. * * * I think that the essential character of the stamp tax on manifests was that of a stamp tax on exports in the same sense as a stamp tax on a bill of lading was a tax on exports."

Not only is the above rule established by judicial decisions, but Congress has also acted thereon in ordering the repayment of taxes collected on export bills of exchange.

By the Act of February 1, 1909, Ch. 53, 35 U. S. Stat. L. 590, the Secretary of the Treasury is authorized and directed to pay out of the Treasury to persons or corporations who have duly presented their respective claims "the sums paid for documentary stamps used on foreign bills of exchange drawn between July first, eighteen hundred and ninety-eight, and June thirtieth, nineteen hundred and one, against the value of products or merchandise actually exported to foreign countries, such stamps representing taxes which were *illegally assessed and collected,* said refund to be made whether said stamp taxes were paid under protest or duress or not."

THIRD.

When goods are to be exported a bill of lading is obtained, and the goods described therein are insured. The bill of lading and the policy of insurance accompany the bill of exchange and are a part of the usual commercial documents

which facilitate the export and make it possible on a large scale. This is alleged in Article 5 of the Petition (p. 3) and admitted by the demurer. The authorities are to the same effect.

In Tamvaco *v.* Lucas, 30 L. J. Q. B. 234, 1 Best & Smith 185, it was said by Cockburn, C. J., as long ago as 1861, (p. 197):

"The contract provides for the payment by the buyers on the delivery of the *shipping documents.* By that I understand the ordinary and usual shipping documents, as they are understood in contracts of this nature by members of the mercantile community. *The policy of insurance is undoubtedly one of these.*"

To the same effect is the judgment of Blackburn, J. (p. 206). The Court so held. The judgment was affirmed in Exchcq. Ch. without opinion; 3 Best & Smith 89.

Hickox *v.* Adams, 1876, 34 L. T. N. S. 404.

Mellish, L. J., p. 407:

"In this case there was a contract to sell and deliver goods between a firm carrying on business at New York and a firm at Gloucester. Is the English firm bound to accept bill of lading of the goods without the policy of insurance? I think they are certainly not so bound. It is clear that the goods could not be sold under the bill of lading without security in case of their total loss at sea. Now there was in fact, no policy on this wheat alone, but there was one on the whole quantity consigned to Kruger & Co. I am of the opinion that we must find that Kruger & Co. were not ready and willing to deliver that policy to the defendants; and if Kruger & Co. had been, the plaintiffs would not have been carrying out their contracts with Adams & Co., the defendants, in deliv-

ering to them a policy covering the whole quantity of the wheat."

S. P. Ireland *v.* Livingston, L. R. 5 H. L. 395, 406.

Benjamin on Sales, 5 Ed., §590, p. 705.

The shipper fulfils the obligation of such a contract "when he has put the cargo on board, and forwarded to the purchaser a bill of lading and policy of insurance, with a credit note for freight."

Stroms Bruks &c. *v.* Hutchinson [1905] Appeal Ca. 515, 528.

Mee *v.* McNider, 109 N. Y. 500, shows that this custom of providing a marine policy of insurance as one of the required documents on a sale for export, is recognized on this side of the Atlantic as well as in England.

The Act of Congress approved September 2, 1914 (Public 193), 63rd Congress, confirms this view of the case. Its preamble is as follows:

"Whereas, the foreign commerce of the United States is now greatly impeded and endangered through the absence of adequate facilities for the *insurance* of American vessels and their *cargoes* against the risks of war; and

Whereas, it is deemed necessary and expedient that the United States shall temporarily provide for the export shipping trade of the United States adequate facilities for the insurance of its commerce against the risks of war; Therefore"

A Bureau of War Risk Insurance is established in the Treasury Department which "shall as soon as practicable make provisions for the insurance by the United States of American vessels, their freight and passage moneys and cargoes shipped

or to be shipped therein, against loss or damage by the risks of war." The Executive, through the Treasury Department, has acted accordingly, and accepts application for insurance and issues policies in the form of which copies are annexed (*post*, pp. 20–21).

It is a well-known historical fact of which this Court may take judicial notice, that between the first of August and the second of September, the difficulty of obtaining insurance against war risks almost destroyed the export trade of the United States, and that the passage of this act and the action of the Executive under it, revived that trade, which is steadily increasing.

Here then is a well-considered declaration of Congress, approved by the President and carried into effect by the Executive, which shows that marine insurance is necessary to the export trade. If this be so, it follows that a tax on the policy or other instrument whereby articles exported are insured is a tax on the export thereof, and therefore repugnant to the Constitution and void.

FOURTH.

It was argued for the defendant in error that the issuing of a policy of insurance is not a transaction of commerce, and Paul *v.* Virginia and N. Y. Life Ins. Co. *v.* Deer Lodge Co. are cited in support of this proposition. Those decisions dealt with the right of a State to regulate the business of insurance done within its limits. They are on the border line that is difficult to trace exactly, between federal power and state power. But the distinction is obvious. The insurance agent who

resides in a State and issues policies of marine insurance there is like the shipbuilder who builds a ship. As long as she is on the stocks, she is not subject to Admiralty jurisdiction. The contract to build her is not a maritime contract:

> Peoples Ferry Co. *v.* Beers, 20 How. 393;
> The Antelope, 2 Bened. 405;
> Cunningham *v.* Hall, 1 Cliff. 43.

But when she is launched, she comes at once under the jurisdiction of the federal courts, and the charter-party for the transportation of cargo upon her is not taxable.

> Hvoslef *v.* United States, United States District Court, Southern District of New York, Noyes C. J. (Opinion in No. 331 on this docket.)

When Paul hired his office in Norfolk, advertised for trade, and secured employment from foreign insurance companies, he was doing business which Virginia could regulate. It could require a license fee to be paid by him.

The business of the petitioner here may lawfully be regulated by the State of New York and a license fee imposed for authority to do it. There is nothing in the Constitution to prohibit this, as was held in Paul *v.* Virginia. When in the course of this business it issues a policy covering goods for coastwise shipment, Congress may tax this. But when it issues a policy covering goods for export to foreign countries, this policy at the moment it is issued becomes a document which facilitates exportation. To quote again from the Fairbank case (p. 293):

"If all exports must be free from national tax or duty, such freedom requires, not simply an omission of a tax upon the articles exported, but also a freedom from any tax which directly burdens the exportation; and, as we have shown, a stamp tax on a bill of lading, which evidences the export, is just as clearly a burden on the exportation as a direct tax on the article mentioned in the bill of lading as the subject of the export."

The Court (p. 291) calls special attention to the fact that under the War Revenue Act the tax is graduated, and that this graduation would enable Congress, if the power to tax at all be sustained, to levy a prohibitory tax and thus defeat the Constitutional prohibition.

In Paul *v.* Virginia the Court cite Nathan *v.* Louisiana, 8 How. 73, in which the validity of a State tax on a broker who dealt solely in foreign bills of exchange was held to be on his business. He is engaged "in supplying an instrument of commerce." In both cases the State law was sustained as a regulation of business done in a State. Whether this business was that of insurance or drawing bills of exchange was not material. On the other hand, in the case at bar the tax is a burden on exportation. It is immaterial whether this is done by a tax on the bill of exchange or on the policy of insurance. It is conceded that the tax on the bill of exchange was for this reason unlawful. By parity of reasoning the tax on the policy is unlawful. Indeed, if there were a distinction it would not sustain the tax on the policy. For there could be exports without bills of exchange. The price could be remitted by cable or in specie. But no bank would advance money on a bill of lading unless the goods were insured. A heavy tax on policies of insurance on exports would destroy the export trade.

In short, when these policies were issued to cover goods which were to be exported, they became at once an instrumentality of export and as such were not taxable.

To use the language of Mr. Justice Brewer, delivering the opinion of the Court in Fairbank *v.* United States, 181 U. S. 283, 291:

"The power to tax is the power to destroy and that power can be exercised, not only by a tax directly on articles exported, but also and equally by a stamp duty on bills of lading evidencing the export."

To this let us add—Also and equally by a stamp duty on policies of insurance securing the export.

FIFTH.

It was argued in the court below that the tax could be sustained on the authority of Cornell *v.* Coyne, 192 U. S. 418, on the ground that the tax was levied without distinction upon policies of marine insurance, whether issued for foreign or domestic commerce, and that it was competent for the Congress to impose a tax upon all properties within the domestic jurisdiction, even though some of it afterwards should be exported. The allegations in the petition, which have been already quoted (*ante,* pp. 3-5), show that the certificate of insurance which closes the contract as to each particular export is not issued until the cargo of goods to be exported has been designated and set apart

from all other goods for shipment upon a particular ship, and that the same was not delivered until the time of the sailing of the vessel or thereafter. For example, it often happens that goods are shipped by a slower ship, because of the rate of freight being less, while the shipping documents are sent by mail by faster ships and reach the consignee before the goods, although not mailed till afterwards. It cannot be said, therefore, that the tax upon these particular certificates of insurance mentioned in the petition is levied while the goods covered by them are part of the general mass of property in this country. Mr. Justice Brewer said in the Cornell case, 192 U. S. 427:

"The true construction of the Constitutional provision is that no burden by way of tax or duty can be cast upon the exportation of articles and does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all properties similarly situated. The exemption attaches to the export and not to the article before its exportation."

In the case at bar the goods in question had already become exports and in most cases actually were at sea when the collector required the stamps to be affixed. This he certainly had no authority to do.

SIXTH.

The preliminary objections to the jurisdiction of the District Court were also taken in the case of Frederick W. Hvoslef *et al. v.* United States.

They were overruled by Circuit Judge Noyes. A writ of error in this case has been sued out by the United States and is now No. 331 on this docket. If renewed by the United States in that case, they will be argued there.

SEVENTH.

The judgment should be reversed, the demurrer overruled, and the case remanded for further proceedings.

EVERETT P. WHEELER,
Of Counsel for plaintiff in error.

APPENDIX TO BRIEF.

APPLICATION FOR CARGO INSURANCE.

From Collector of Customs at.....

The United States of America

TREASURY DEPARTMENT

BUREAU OF WAR RISK INSURANCE

WASHINGTON, D. C.

Insurance is limited to cargoes on American vessels against the risks of war and may only be effected when the marine risks of the said cargo are insured by approved insurance companies or underwriters.

Insurance is wanted by For account of Loss, if any, payable to	DESCRIPTION OF MERCHANDISE. (Include marks and numbers.)	MARINE INSURANCE CARRIED. Company. Amount.
Per vessel of line or owner.	MERCHANDISE. Valued at Amount insured.	Rate Premium.

At and from to

Application is made for insurance against war risks on the form of policy issued by the Bureau of War Risk Insurance, the following special conditions being imposed, which conditions may not be changed except under signature of the Director of the Bureau of War Risk Insurance:

A. Warranted that the vessel will sail within fifteen days from the date on which this insurance is effected, but in the event of the vessel sailing after that time it is agreed to hold the assured covered on notice to and payment of the additional premium required by the Bureau of War Risk Insurance based on rates current at the time of sailing.

B. The amount insured against war risks can not under any circumstances exceed the amount insured against marine risks. If the applicant is unable to state definitely the amount to be insured he shall declare a provisional amount, which may not be increased, but which may be reduced upon receipt of definite advice, to an amount not less than the total amount insured under marine policies. Premium shall be paid on this provisional amount, and if the amount is reduced when final particulars are known the excess of such premium will be returned to the assured by the Treasury Department of the United States Government.

An application not stamped "Paid" by a Government representative is null and void.

C. The following articles will not be insured if destined to countries of the belligerents or their colonies:

(1) Arms of all kinds, including arms for sporting purposes and their distinctive component parts.
(2) Projectiles, charges, and cartridges of all kinds, and their distinctive component parts.
(3) Powder and explosives especially prepared for use in war.
(4) Gun mountings, limber boxes, limbers, military wagons, field forges, and their distinctive component parts.
(5) Clothing and equipment of a distinctively military character.
(6) All kinds of harness of a distinctively military character.
(7) Saddle, draught, and pack animals suitable for use in war.
(8) Articles of camp equipment and their distinctive component parts.
(9) Armor plates.
(10) Warships, including boats and their distinctive component parts of such a nature that they can only be used on a vessel of war.

premium required by the Bureau of War Risk Insurance based on rates current at the time of sailing.

B. The amount insured against war risks can not under any circumstances exceed the amount insured against marine risks. If the applicant is unable to state definitely the amount to be insured he shall declare a provisional amount, which may not be increased, but which may be reduced upon receipt of definite advice, to an amount not less than the total amount insured under marine policies. Premium shall be paid on this provisional amount, and if the amount is reduced when final particulars are known the excess of such premium will be returned to the assured by the Treasury Department of the United States Government.

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(6) All kinds of harness of a distinctively military character.
(7) Saddle, draught, and pack animals suitable for use in war.
(8) Articles of camp equipment and their distinctive component parts.
(9) Armor plates.
(10) Warships, including boats and their distinctive component parts of such a nature that they can only be used on a vessel of war.
(11) Aeroplanes, airships, balloons, and air craft of all kinds and their component parts, together with accessories and articles recognizable as intended for use in connection with balloons and air craft.
(12) Implements and apparatus designed exclusively for the manufacture of munitions of war and for the manufacture or repair of arms, or war material for use on land and sea.

D. The following articles will not be insured if destined for the use of the armed forces or of a government department of a belligerent state, or are consigned to the authorities of a belligerent state, or to a contractor established in a belligerent country who, as a matter of common knowledge, supplies articles of this kind to a belligerent state, or are consigned to a fortified place belonging to a belligerent or other place serving as a base for the armed forces of a belligerent:

(1) Foodstuffs.
(2) Forage and grain suitable for feeding animals.
(3) Clothing, fabrics for clothing, and boots and shoes suitable for use in war.
(4) Gold and silver in coin or bullion; paper money.
(5) Vehicles of all kinds available for use in war, and their component parts, including automobile tires and treads.
(6) Vessels, craft, and boats of all kinds; floating docks, parts of docks, and their component parts.
(7) Railway material, both fixed and rolling stock, and materials for telegraphs, wireless telegraphs, and telephones.
(8) Fuel; lubricants.
(9) Powder and explosives not specially prepared for use in war.
(10) Barbed wire and implements for fixing and cutting the same.
(11) Horseshoes and shoeing materials.
(12) Harness and saddlery.
(13) Field glasses, telescopes, chronometers, crystalines, and all kinds of nautical instruments.
(14) Copper, nickel, and lead in pig, sheet, or pipe.
(15) Iron and steel of all kinds and oxides, sulphates, and carbonates of iron.
(16) Hematite iron ore; magnetic iron ore.
(17) Ferrochrome.
(18) Glycerine.
(19) Rubber.
(20) Hide and skins, raw or rough tanned (not including dressed leather).

.....

Applicant.

No. 3
CARGO

No._____

The United States of America

TREASURY DEPARTMENT

BUREAU OF WAR RISK INSURANCE

WASHINGTON, D. C.

.....*on account of whom it may concern.*

In case of loss, to be paid in funds current in the United States to

Do make insurance and cause to be insured at and from

SUM INSURED

$..... _____ Dollars.

Upon.....per the Vessel called the.....

or by whatsoever other name or names the said vessel is or shall be named or called, beginning the adventure upon the said goods and merchandise from the loading thereof on board the said vessel as above, and shall so continue and endure during her abode there and until the vessel with her goods and merchandise shall be arrived at as above and be there discharged and safely landed. The said cargo for so much as concerns the insured, by agreement between the insured and the insurers

TREASURY DEPARTMENT

BUREAU OF WAR RISK INSURANCE

WASHINGTON, D. C.

.....*on account of whom it may concern.*

In case of loss, to be paid in funds current in the United States to

Do make insurance and cause to be insured at and from

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Touching the adventures and perils which the insurer is contented to bear, and does take upon itself, they are of men-of-war, letters of marque and countermarque, surprisals, takings at sea, arrests, restraints and detainments of all kings, princes, and peoples, of what nation, condition, or quality soever, and all consequences of hostilities or war-like operations, whether before or after declarations of war.

Warranted not to abandon in case of blockade and free from loss arising from an attempt to evade blockade, but, in the event of blockade, to be at liberty to proceed to an open port and there end the voyage.

Warranted not to abandon in case of capture, seizure, or detention until after condemnation.

Warranted free from any claim for interest, loss of market or damage by deterioration due to delay.

This policy does not extend to or cover absolute contraband of war or conditional contraband of war when the articles constituting such conditional contraband are destined for the use of the armed forces or of a government department of a belligerent state, or are consigned to the authorities of a belligerent state, or to a contractor established in a belligerent country who, as a matter of common knowledge, supplies articles of this kind to a belligerent state, or are consigned to a fortified place belonging to a belligerent or other place serving as a base for the armed forces of a belligerent.

And in case of any loss or misfortune, it shall be lawful to the insured, their factors, servants, and assigns, to sue, labor and travel for, in and about the defense, safeguard, and recovery of the said goods and merchandise, or any part thereof, without prejudice to this insurance, to the charges whereof the insurer will contribute according to the rate and quantity of the sum herein insured. And it is especially declared and agreed that no acts of the insurer or insured in recovering, saving, or preserving the property insured, shall be considered as a waiver or acceptance of abandonment; having been paid the consideration for this insurance, by the insured or.....assigns, at and after the rate of.....per cent.

PREMIUM

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It is agreed that this insurance shall not be vitiated by a deviation from the voyage provided the same be communicated to the Bureau of War Risk Insurance as soon as known to the insured and an additional premium paid if required.

Warranted sailing under the American flag.

In the event of loss and claim, prompt notice should be given the Bureau of War Risk Insurance. Claims will be paid within thirty days after complete proofs of interest and loss have been filed with the Bureau.

IN WITNESS WHEREOF, The United States of America has caused this policy to be signed by its Secretary of the Treasury, but it shall not be valid until countersigned by William C. De Lanoy or J. Brooks B. Parker.

Secretary.

Countersigned at Washington, D. C., this ..... day of ....., 191.....

.....

Director.